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No. 278

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

28

THE CUDAHY PACKING COMPANY, A CORPORATION,
Appellant,

v.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

Appeal From the District Court of the United States for the Western District of Washington.

BRIEF FOR APPELLANT.

E. B. PALMER,
THOS. M. ASKREN,
S. W. BRETHORST,
THOS. CREIGH,
J. HARRY COVINGTON,
Solicitors for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1928.

The Cudahy Packing Company, a Corporation,
Appellant,

v.

Jay Grant Hinkle, Secretary of State, and John H. Dunbar, Attorney General of the State of Washington, *Appellees.*

Appeal From the District Court of the United States for the Western District of Washington.

BRIEF FOR APPELLANT.

REPORT OF OPINIONS BELOW.

The opinions of the statutory court (R. 24-44) are reported in 24 Fed. Rep. (2nd) p. 124.

STATEMENT OF THE CASE.

This is an appeal from a decree made on May 8th, 1928, as amended by a decree of June 7th, 1928, by Honorable Frank S. Dietrich, Circuit Judge, and Hon-

orable Edward E. Cushman and Honorable George M. Bourquin, District Judges, sitting as a statutory court under Section 266 of the Judicial Code, which decree denied an application of The Cudahy Packing Company, appellant here, for an interlocutory injunction restraining the Secretary of State and the Attorney General of the State of Washington from enforcing against appellant the provisions of the Washington statutes with reference to the issuance of permits to foreign corporations transacting business therein and exacting an annual tax therefrom, for the reason that the statutes are violative of the Federal Constitution.

The substantial and material facts are as follows:

The appellant, The Cudahy Packing Company, is incorporated under the laws of Maine, is the successor of a corporation of the same name organized under the laws of Illinois, and is engaged in the business of preparing meats and foodstuffs at its several packing plants and selling the same in interstate commerce in all the forty-eight states and in almost all foreign countries. (R. 1, 2, 3 and 5.)

In the year 1890 appellant's predecessor first entered and began doing business in the State of Washington. Appellant qualified to do business in Washington in January, 1916, but it does not now, nor has it ever, maintained a slaughter house or packing plant in the State of Washington, its only agency in Washington being a warehouse and sales office which is located in Seattle. Since establishing an agency in Washington, the business transacted has been the importation into Washington and the sale there, or the importation and delivery there after sale elsewhere, of its goods, and such other transactions as are incidental to its interstate business and so closely related thereto as that

they, either in whole or in part, cannot be separated from the interstate commerce business of the appellant without burdening such commerce and rendering the conduct thereof more expensive and less convenient. (R. 3, 4, 5 and 25.)

Appellant's authorized capital is $45,000,000.00, but of this authorized capital only $29,800,000.00 has been issued, and all of its property, wherever situated, does not exceed in value the amount of its issued capital stock. Of the capital stock issued, only $40,000.00 represents the assets and property of appellant located or in any way used in Washington. Of all of its business during the past year appellant only transacted 6/1000 in the State of Washington, and of this less than half was intrastate business. The stock of goods carried in its Seattle warehouse consists, in the most part, of original packages, and more than half of such goods are shipped out to purchasers in unbroken packages. (R. 4, 5, 8, and 25.)

Appellant qualified to do business in Washington in 1916 by filing its articles of incorporation and paying a filing fee of $25 as required by law. (R. 5, 8.) Its capital stock was then $20,000,000. (R. 5.) In 1919 appellant's authorized capital stock was increased to $35,000,000. Although no law of Washington at that time required the filing of a certificate of increase of capital stock, appellant did file such a certificate and paid a fee of $10. (R. 5, 8.) Subsequent to 1919 appellant's authorized capital stock was increased to $45,000,000. No certificate of this increase has been filed. (R. 5.)

In 1925, by Chapter 147, Section 1, Extraordinary Session of 1925, Section 3853 of Remington's Compiled Statutes of Washington was amended to require every foreign corporation desiring to do business in Wash-

ington to file with the Secretary of State certificates of increase of capital stock. (See page 34, *infra.*)

At the same session of the legislature by Sections 1 and 2 of Chapter 149, fees were provided for filing articles of incorporation or amendments thereto increasing capital stock. These fees were based upon the authorized capital stock and for corporations having an authorized capital stock of $45,000,000 required a payment of $1180,—$750 for the first $1,000,000, and $10 for each $1,000,000 or fraction thereof in excess of $2,000,000. When amendments increasing capital stock were filed the tax was to be computed upon the total authorized capital stock and credits allowed for amounts previously paid as filing fees. A maximum tax of $3,000 was provided for. (See pages 29, 30, *infra.*)

By Section 3 of the same Chapter, an annual license tax was imposed also based upon authorized capital stock. As applied to a corporation having an authorized capital stock of $45,000,000, the annual license tax so imposed was $580. A maximum tax of $3,000 was also provided for. (See pages 30, 31, *infra.*)

The penalties incurred for failure to pay the filing fees provided for above are as follows:

Section 3855, Rem. Compl. Stats.: Penalty of $250.

Section 3861, Rem. Compl. Stats.: Any agent of any foreign corporation carrying on business without filing the documents referred to may be fined $200 or imprisoned for three months or both.

The penalties incurred for failure to pay the annual license tax are as follows:

Section 3842, Rem. Compl. Stats.: No corporation can commence or maintain any action in court.

Failure to pay tax is prima facie evidence of insolvency.

Name stricken from list for failure to pay for two years and any other corporation may take name.

State may sue for tax.

Section 3846, Rem. Compl. Stats.: If all license taxes and penalties are not paid within three years the corporation is dissolved and property is disposed of by court proceedings to creditors and stockholders.

These statutes are printed on pages 31 to 37, *infra*.

In 1926 appellant tendered the Secretary of State, for filing, its certificate of increase of capital stock together with a filing fee of $10. The Secretary of State refused to file the certificate or to accept the fee and demanded as a condition precedent to filing it a fee of $545.* (R. 8.)

In 1927 appellant tendered the Secretary of State and the State Treasurer $15.00—the annual license tax imposed by Chapter 140 of the Laws of 1907—and demanded a license to do business in the State of Washington. But these officers, acting under the statutes referred to above, refused such license unless and until appellant paid for filing its certificate of increase of capital stock a fee of $545 and the annual license fee of $580. (R. 14-15.)

Upon the refusal of appellant to pay the annual li-

*The amount demanded was due to an error in calculation. The correct fee under the statute was $1180 less $35 previously paid, or $1145,

cense fee the officers mentioned informed appellant that unless the fees were paid, the Secretary of State would refuse to issue to the appellant any license permitting it to do business in the State of Washington for the year commencing July 1st, 1927, and subsequent years, and would in accordance with the laws above mentioned strike appellant's name from the records of his office and enter thereon a notation of the appellant's dissolution as a corporation; that appellant would be deprived on and after the 1st day of July, 1927, of the right to commerce or maintain any action, suit or proceeding in any court of the State of Washington, would be under a presumption of insolvency and under a constant threat and danger of receivership and in danger of the loss of its name to some other corporation thereafter organized. The officers have notified the State Board of Tax Commissioners under the authority of the Section 3842, of the delinquency of appellant, and the Board through the Attorney General is threatening suit to enforce the payment of such license fee. The Secretary of State has informed appellant that he is about to forfeit, on the books of his office, the right of appellant to do business in the State, and to advise appellant's debtors and those having claims against it of that fact, and is about to issue a certificate to that effect to such persons. The Attorney General is threatening to institute suits against appellant for penalties for non-payment of its license tax,—to oust it from doing business in the State of Washington, and commence actions against all of appellant's agents in the State. (R. 9, 10, 15, 16, 17.)

These threats, if carried out, will deprive appellant of its right to do interstate business and business incidental thereto in the State of Washington, and cause appellant irreparable injury.

The appellant thereupon applied to the United States District Court for an injunction praying for an interlocutory injunction. The defendants moved to dismiss the bill. The interlocutory injunction was denied and the bill dismissed as set forth above. Each member of the statutory court filed an opinion. Judge Bourquin dissented. (R. 24, 38, and 42.)

ASSIGNMENT OF ERRORS.

I.

The District Court of the United States erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not regulate and burden appellant's business in interstate commerce, in violation of Article I, Section 8, Paragraph 4 of the Constitution of the United States, and that the alleged fees or taxes threatened to be imposed upon appellant by the pretended authority of said statute were not unlawful by virtue thereof.

II.

The District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by imposing a tax upon the property of appellant beyond the jurisdiction of the State of Washington.

III.

The District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deny to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, by arbitrarily and unreasonably imposing a tax upon the authorized but unissued capital stock of appellant.

IV.

The District Court erred in denying the petition of appellant for an interlocutory injunction, and in dismissing the bill of complaint and in not granting said interlocutory injunction.

SUMMARY OF ARGUMENT.

I. Chapter 149, Laws of Washington, Extraordinary Session 1925, is in legal effect a tax upon all of the property represented by the capital stock of the appellant, therefore a tax upon such parts of the property as are engaged in interstate commerce, and an invalid tax under the commerce clause of the Constitution of the United States, Section 8, Article I.

It is apparent that the statutory court thought that the case of *Baltic Mining Co. v. Mass.*, 231 U. S. 68, was controlling in the instant case. The *Baltic* case, however, was not only based on facts entirely dissimilar to the facts in the case at bar, but has been restricted and disapproved if not overruled by this Court in *Alpha Portland Cement Company v. Mass.*, 268 U. S. 203, and other cases which furnish the controlling authorities here.

II. Chapter 149, Laws of Washington, Extraordinary Session 1925, operates to tax the property of the appellant beyond the territorial jurisdiction of the State, which is not amenable to its revenue laws and is therefore confiscatory in nature and deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

III. Chapter 149, Laws of Washington, Extraordinary Session 1925, operates to tax the authorized capital stock of appellant, irrespective of the amount issued, which is arbitrary and has no reasonable relation to the value of the privilege exercised in Washington, and is therefore violative of the equal protection clause and abridges the corporation's privileges and immunities as a citizen in violation of the Fourteenth Amendment to the Constitution.

I.

Chapter 149, Laws of Washington, Extraordinary Session of 1925, is in Legal Effect a Tax Upon All of the Property Represented by the Capital Stock of the Appellant, Therefore a Tax Upon Such Parts of the Property as Are Engaged in Interstate Commerce, and an Invalid Tax Under the Commerce Clause of the Constitution of the United States, Section 8, Article I.

1. *The Principles Applicable to this Case are Clear And Have Been Repeatedly Enunciated by this Court. The Statutes In Question Patently Violate These Principles.*

This Court has laid down the following principles which govern the validity of license taxes imposed by

states on foreign corporations as a condition of permission to do business within the state:

> The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed; but the amount must be made dependent on the value of the property situated within the state, and no excise will be supported which is laid upon a foreign corporation on account of interstate business.
>
> A state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state, and it cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state, for this is prohibited by the Fourteenth Amendment to the Constitution of the United States.
>
> A state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business.
>
> A license fee of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, is a tax on the entire business of the corporation and on its entire property, including that in other states, for the capital stock of a corporation represents all its business of every class and all its property wherever located.
>
> The amount of the tax demanded is unimportant when there is no legitimate basis for it.
>
> The mere number of authorized shares of capital stock is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of annual license fees, for such a classification is not based on anything having relation to the purpose for which it is made and does not produce equity.

A tax levied by a state on the business of a foreign corporation is a burden upon interstate commerce if there is such connection between interstate and local business that discontinuance of the local business would seriously impair the interstate business on account of economy of operation.

Interstate business is unduly burdened if a foreign corporation has acquired permanent property in the state before the imposition of the license tax, especially adapted to carrying on both classes of business and not interstate commerce alone.

Postal Telegraph Cable Co. v. Adams, 155 U. S. 688;
Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Pullman Co. v. Kansas, 216 U. S. 56;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Southern Ry. Co. v. Greene, 216 U. S. 400;
International Text Book Co. v. Pigg, 217 U. S. 91;
Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280;
Buck Stove & Range Co. v. Vickers, 226 U. S. 205;
Sioux Remedy Co. v. Cope, 235 U. S. 197;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Cheney Bros. Co. v. Mass., 246 U. S. 147;
Union Tank Line Co. v. Wright, 249 U. S. 275;
Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71;
Alpha Portland Cement Co. v. Mass., 268 U. S. 203;
Hanover Fire Ins. Co. v. Harding, 272 U. S. 494;
Southern Ry. Co. v. Kentucky, 274 U. S. 76;
Sprout v. South Bend, 277 U. S. 163.

Foster-Fountain Packing Co. v. Haydel, Decided Oct. 15, 1928, Advance Opinions, 73 L. ed. 1.

The system of taxation attacked in the foregoing cases is precisely the same as that in the Washington statute now before this Court for consideration; that is to say, fixed amounts are payable, graduated according to the amount of the authorized capital stock. They differ from the Washington statute in that the Washington statute fixes a limitation or maximum fee while those statutes have no such limitation.

The facts of the instant case bring it within the principles laid down in the preceding cases.

The appellant's predecessor came into Washington, filed its articles of incorporation and began doing interstate and intrastate business in the year 1890, at which time no tax or fee was imposed. The statute in question was not enacted until 1925, and at that time appellant had already acquired permanent property adapted to carrying on both an interstate and intrastate business, and was carrying on, as it now is, an inconsiderable local business—less than 3/1000 of its total business—as incidental to, and in aid of, its interstate business, from which it is inseparable without serious impairment of the interstate business.

Appellant's authorized capital is $45,000,000.00, but of this only $29,800,000.00 has been issued; and of its capital stock issued, only $40,000.00 represents its assets and property located or in any way used in Washington, and therefore the State of Washington is taxing the appellant on $29,760,000.00 of its property located in other states, as well as on $15,200,000.00 of capital stock which represents no property whatsoever.

The statute in the case of *Looney v. Crane Co.*, 245 U. S. 178, is almost identical with the Washington statute in the instant case, for it required both the payment of a filing fee and annual license fee. This Court in that case for the first time passed upon the validity of an annual franchise tax and held it void, not only because of the dependence of the two provisions (the filing fee and annual franchise tax), but because, considered alone, it was objectionable as a burden upon interstate commerce.

The facts in the instant case make the Washington statute more objectionable than the Texas statute as applied in the *Crane* case. The intrastate business of the Crane Company far exceeded that of the appellant, its intrastate business having been 1/39 of all its business, while the intrastate business of appellant is less than 3/1000 of all of its business. The assets of the Crane Company far exceeded its capital stock, all of which was issued, while the assets of the appellant do not exceed the amount of its issued capital stock, which is less than two-thirds of its authorized capital stock. Thus the facts of the instant case clearly bring it within the decision of the *Crane* case, and the Washington statute should therefore be held void.

2. *The Baltic Mining Co. Case Has Not Only Been Disapproved By This Court, But is Inapplicable to the Facts of This Case.*

Subsequent to the decisions of this Court in the *Western Union Tel. Co. v. Kansas, supra,* and *Pullman Co. v. Kansas, supra,* and prior to the decisions in the *Looney v. Crane Co.*, and *Alpha Portland Cement Co. v. Massachusetts, supra,* the case of *Baltic Mining Co. v. Mass.*, 231 U. S. 68, and several companion cases

were decided by this Court, in which statutes which levied a graduated fee or tax according to the amount of the authorized capital stock of the foreign corporation, but with a limited or maximum fee, were held valid.

Baltic Mining Co. v. Mass., 231 U. S. 68;
St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350;
Kansas City, Fort Scott & M. Ry. Co. v. Botkin, 240 U. S. 227;
Lusk v. Botkin, 240 U. S. 236;
Kansas City, Memphis & B. Ry. Co. v. Stiles, 242 U. S. 111;
General Ry. Signal Co. v. Virginia, 246 U. S. 500.

It is apparent from the decisions of the statutory court in the instant case that the majority of the court considered the *Baltic* case and its companion cases controlling of the case at bar, and expressed the opinion that the *Baltic* case was not overruled by the case of *Alpha Portland Cement Co. v. Mass., supra,* although it had been criticized and restricted by this Court in *Looney v. Crane Co., supra; International Paper Co. v. Mass., supra,* and *Air-Way Electric Appliance Corp. v. Day, supra,* and finally, by unanimous decision of this Court, was expressly overruled, the Court in its opinion, *Alpha Portland Cement Co. v. Mass., supra,* at page 218, stating:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clauses; and the Fourteenth Amendment

> does not permit taxation of property beyond the state's jurisdiction. *The amount demanded is unimportant* when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co. v. Mass.*, 231 U. S. 68; 58 L. ed. 127; 34 Sup. Ct. Rep. 15; tends to support a different view, *it conflicts with conclusions reached in later opinions and is now definitely disapproved.*" (Italics ours.)

The statement of the court to the effect that one of the considerations upon which the tax can be upheld is that, where a maximum fixed by law does not itself appear to be unreasonable in amount, it will be upheld, ignores the clear holding of this Court in the *Alpha Portland Cement* case that "*the amount demanded is unimportant where there is no legitimate basis for the tax.*"

The Baltic Mining Co. was a Delaware corporation, and, as this Court said, "*was not engaged in interstate commerce in Massachusetts.*" It maintained its office in Boston for the use of its officers and for the general financial management and direction of its affairs, for the meeting of its board of directors and for the transfer of its stock. What business it transacted was *purely local,* and its assets amounted to more than four times its capital stock. This Court stated that it was not intended in any way to limit the cases of *Western Union Tel. Co. v. Kansas, supra,* and other cases cited above, and further stated that each case must be considered on its own facts.

The *Cudahy* case is so dissimilar to the *Baltic* case, except that there is a similar limitation on the amount of the fee, that it should not be considered as governed by it. The appellant carries on an extensive interstate commerce in the State of Washington, while its local

business is inconsiderable, although in aid of its interstate business, from which it is inseparable without serious impairment of the interstate business. In the *Baltic* case Justic Day said that the Supreme Judicial Court of Massachusetts held that the Massachusetts statute therein considered "did not apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation."

It is very evident that the court, speaking through Justice Day, did not intend to sustain such a tax applied to one in the position of the appellant in the instant case.

The Court, however, in its opinion upheld the Massachusetts statute, which levied a tax on the authorized capital stock of foreign corporations far in excess of property within the state, on the three following grounds:

1. The tax was subject to a statutory limitation of $2,000.00.
2. The amount was small when contrasted with that in the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1.
3. The tax was not void because imposed upon property beyond the state's jurisdiction.

We submit that Judge Bourquin, in his lucid dissenting opinion, was correct when he stated:

> "At least the second and third of these reasons, however, are overruled in *Alpha Portland Cement Co. v. Mass., supra,* and the first, if not overruled,

has no legitimate justification. It is an excuse rather than a reason.

"For in that case, as in this at bar, the limitation avails nothing to the corporation if not attained. Despite it the tax is as great as if there was no limit, and none the less is a tax upon property beyond the state's confines. And in principle and by implication, the *Alpha* case overrules said first reason."

The *Arkansas, Botkin, Stiles,* and *General Railway Signal* cases, companion cases of the *Baltic* case heretofore referred to, were relied upon also by the Attorney General in the lower court as sustaining the validity of the tax or fee imposed on corporations in proportion to their authorized capital stock, whether the property represented by the stock is situated in the state or not. But these cases, we respectfully submit, do not so hold.

The tax in *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350, was sustained by this Court because it was fixed at a percentage of the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the state. This Court held that the franchise intended to be taxed was that which related solely to intrastate business. A special emphasis was laid upon the principle announced in the case of *Postal Telegraph Cable Co. v. Adams,* 155 U. S. 688, that property in a state may be taxed "if the ascertainment of the amount is made dependent in fact on the value of its property within the state, * * * and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

But under the Washington statute appellant is abso-

lutely required to pay a tax on all its property in the forty-eight states and in many foreign countries, for the tax is not dependent on the value of appellant's property in Washington, but on all its property and assets everywhere.

The case of *Kansas City, Fort Scott & M. Ry. Co. v. Botkin,* 240 U. S. 227, involved a tax on a domestic corporation, and was held to be a tax on the privilege of being a corporation in the state of its origin. The succeeding case of *Lusk v. Botkin,* 240 U. S. 236, involved a tax only on the proportion of the issued capital stock represented by its property and business in Kansas.

In the case of *Kansas City, Memphis & B. Ry. Co. v. Stiles,* 242 U. S. 111, a franchise tax was levied on a corporation which had consented to be subject to the same laws as a domestic corporation, it having become a consolidated company under the laws of the state.

In *General Ry. Signal Co. v. Virginia,* 246 U. S. 500, a Virginia law imposed a fee on foreign corporations for the privilege of doing a local business. The prescribed fees did not vary in direct proportion to the capital stock, and a maximum was fixed. In sustaining a maximum fee of $5,000.00, this Court said that the case was on the border line.

None of these cases are authority for sustaining a tax on a foreign corporation engaged in interstate commerce, which tax is imposed in proportion to the authorized capital stock of the corporation representing all its property and business, a relatively small proportion of which is within the state of taxation. This Court also commented that the domestic business of the companies involved was quite separate from their interstate business, as is not the case with appellant, *which uses the same instrumentalities and agencies*

for carrying on both intrastate and interstate commerce.

Even in the cases cited to support its validity, the distinctions made by the Justices rendering the opinions necessarily imply the invalidity of the tax here in question.

3. *State Courts Applying Decisions of This Court Have Uniformly Held Similar Statutes Unconstitutional.*

The validity of statutes almost identical to that of the Washington statute, Chapter 149, Extraordinary Session, Laws of 1925, has been before the courts of five states and they were all uniform in holding that the decisions of the United States Supreme Court in *Alpha Portland Cement Co. v. Mass.*, 268 U. S. 203, *International Paper Co. v. Mass.*, 246 U. S. 135, and *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, realigned that Court in accord with such previous decisions as *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and companion cases, and distinguished and definitely overruled *Baltic Mining Co. v. Mass.*, 231 U. S. 68.

Perkins Manufacturing Co. v. Jordan, 200 Cal. 667;
Badger v. Crockett, 259 Pac. (Utah) 921;
The O'Gara Coal Co. v. Emmerson, 326 Ill. 18;
Hirschfeld v. McCullagh, 64 Ore. 502;
J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380;
Minneapolis Steel & Machinery Co. v. Crockett, 263 Pac. (Utah) 926.

In all of these cases but the Montana case, a maximum fee was fixed by the statutes, but the courts held

that this would not save them, for the amount demanded is unimportant when there is no legitimate basis for the tax. The California case of *Perkins Manufacturing Co. v. Jordan,* 200 Cal. 667, is of peculiar interest, for the court overthrew its holding in the case of *Pick v. Jordan,* 169 Cal. 1, which case had held a similar statute of California unconstitutional because of the court's desire to follow the United States Supreme Court in *Baltic Mining Co. v. Mass.,* 231 U. S. 68, which it at that time had considered indistinguishable from the cases of *Western Union Tel. Co. v. Kansas, supra,* and others cited on page 11.

The validity of the Washington statute, Chapter 149, Extraordinary Session, Laws of 1925, was recently considered by the Supreme Court of Washington in the case of *Great Northern Ry. Co. v. Washington,* 147 Wash. 630, in which case the court held the statute invalid and void as to railway companies doing both a local and interstate commerce. The court did not find it necessary to rest its decision on the overruling of the *Baltic* case, and stated that it was undetermined as to whether it had been fully disapproved by this Court. The reasons given for the decision were that a public carrier was not free to withdraw from business in the state, and that the statute violated the due process clause of the Fourteenth Amendment to the Federal Constitution because of imposing a tax on property beyond the jurisdiction of the state.

It is submitted that the first reason given applies equally to appellant, for it is no more free to withdraw from the State of Washington than is a public carrier. It is true that appellant has not invested in property in this State such a large percentage of its capital stock as has the Great Northern Railway Com-

pany, but yet it has a large and substantial investment, and in the past year has done a business of a half million dollars in the State. The Great Northern Railway Company also has ten times the issued capital stock of appellant, while its property in Washington, it is true, is a hundred times the value of appellant's. To compel appellant to withdraw from Washington is a violation of the commerce clause of the Constitution just as much as to compel the Great Northern Railway Company to withdraw. The amount involved is unimportant where there is a clear violation of the Constitution, for one's rights, even though small, are sacred and will be fully protected. The violation of one's constitutional rights, regardless of the extent, will not be countenanced. If appellant refuses to assume the unconstitutional burden, then its local business must cease, and hence the property established for the purpose of doing its local business will be confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. *Western Union Tel. Co. v. Kansas,* 216 U. S. 1.

It is further submitted that the last reason given by the court in the *Great Northern* case must be considered as invalidating the statute as to all foreign corporations carrying on local and interstate commerce which have assets or property in other states, whether they be public carriers or not.

II.

Chapter 149, Laws of Washington, Extraordinary Session 1925, Operates to Tax the Property of the Appellant Beyond the Territorial Jurisdiction of the State, Which is Not Amenable to Its Revenue Laws and is Therefore Confiscatory in Nature and Deprives Appellant of Its Property Without Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution of the United States.

State statutes imposing a tax on the authorized capital stock of a foreign corporation exert a taxing authority of the state over property and rights wholly beyond its confines and not subject to its jurisdiction, and therefore constitute a taking without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Pullman Co. v. Kansas, 216 U. S. 56;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
International Text Book Co. v. Pigg, 217 U. S. 91;
Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Alpha Portland Cement Co. v. Mass., 268 U. S. 203;
J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380;
General Electric Co. v. Stewart, 60 Mont. 387;
Perkins Manufacturing Co. v. Jordan, 200 Cal. 667;
Badger v. Crockett, 259 Pac. (Utah) 921.

III.

Chapter 149, Laws of Washington, Extraordinary Session 1925 Operates to Tax the Authorized Capital Stock of Appellant, Irrespective of the Amount Issued, Which is Arbitrary and Has No Reasonable Relation to the Value of the Privilege Exercised in Washington and is Therefore Violative of the Equal Protection Clause and Abridges the Corporation's Privileges and Immunities as a Citizen, in Violation of the Fourteenth Amendment to the Constitution of the United States.

The law of the state in which a corporation is incorporated alone confers any benefit on it; from it alone does it derive any benefit peculiar to its corporate structure, to its internal arrangement, whether to classes of stock or otherwise, and, of course, from that law alone does it derive any benefit with respect to the amount of its authorized capital stock. It follows as a necessary result that the state of incorporation may levy a tax on the corporation based on its capital stock, whether issued or unissued; but any other state is powerless to impose on that corporation any tax whatsoever based on its capital stock, where it does not represent property within the state nor bear any relation to it, and especially where only a part of it is issued, for it confers no benefit on it in respect to its capital stock or the amount or manner in which it issues it.

The only privilege that the State of Washington grants to appellant for the filing fee of $545.00 and an annual license fee of $580.00 is the privilege of doing business in the State, and nothing more, and grants to it no privilege on account of its unissued

capital stock, nor the use of the proceeds from the sale thereof, if eventually issued. It is self-evident that a tax upon appellant with an authorized capital stock of $45,000,000.00, with only $29,800,000.00 of it issued, and which does less than $500,000.00 worth of intrastate business in Washington, as compared with the same tax upon a like corporation with all of its stock issued and in use in this State, is a tax which has no relation to the value of the business done or the ability or right to transact business herein.

Until the case of *Air-Way Electric Appliance Corp. v. Day,* 266 U. S. 71, no case was presented in which the corporation complaining of the tax measured by its authorized capital stock had less than its total capital stock outstanding. Consequently, none of the cases of this Court heretofore cited present the question now discussed.

This Court held in the *Air-Way* case that the number of shares of a foreign corporation not subscribed or issued has no relation to the privilege held by the corporation in a state other than that in which it was incorporated, and is not a reasonable measure of such a fee. It further held that a fee based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock, or to its value, or to the amount of the foreign corporation's capital, property or business, intrastate or interstate.

In a subsequent decision, *Roberts & Schaefer Co. v. Emmerson,* 271 U. S. 50, this Court pointed out that the tax in the *Air-Way* case was held void not alone because it involved interstate commerce but because it was a discriminatory tax, since it resulted in a tax larger than the tax imposed upon other corporations with like privileges and like business and property

within the state but with a smaller capital authorized under the laws of the state of their creation.

Since the decision in the *Air-Way* case, three state courts have had presented to them the question of the constitutionality of the tax upon authorized capital stock where only a portion of the authorized stock was issued, as in this case, and each of the courts were unanimous in holding such taxes to be unconstitutional.

The O'Gara Coal Co. v. Emmerson, 326 Ill. 18;
Perkins Manufacturing Co. v. Jordan, 200 Cal. 667;
Minneapolis Steel & Machinery Co. v. Crockett, 263 Pac. (Utah) 926.

A perfunctory reading of the case of *Roberts & Schaefer Co. v. Emmerson, supra,* might lead one to think that certain expressions therein were intended to modify the *Air-Way* case; but a careful reading of the decision brings to light the peculiar facts on which the court permitted the state to levy a tax on unissued capital stock. The Corporation was a domestic corporation with all of its stock issued and all of its property located within the state, and it was engaged only in intrastate commerce and carried on no interstate commerce whatsoever.

In the cases of this Court heretofore cited it has been uniformly held that a state cannot tax property belonging to a foreign corporation neither located nor used within the confines of the state, and that a license fee based upon the entire authorized capital of the foreign corporation is essentially a tax upon its entire business and property everywhere. Thus it follows that if the State of Washington is powerless to im-

pose a tax on the business of appellant done outside of the State and on its property without the State, it cannot be contended that it has the power to levy a tax against appellant on $15,200,000.00 of unissued capital stock, which represents no property or business whatsoever, in or out of the State of Washington. Surely it cannot be contended that the $15,200,000.00 of unissued capital stock has any relation to the privilege held by appellant in Washington, and cannot in any manner be said to be a reasonable measure of such a fee. This stock may never be issued, and if not, then it in no wise affects the amount of business done or the opportunity of doing an increased business, either interstate or intrastate, in Washington or anywhere. And again, if this $15,200,000.00 of stock is issued, and the money is paid into the treasury of the corporation, it may be used in its entirety in another state, or in a foreign country, and thus it is unreasonable and unfair for the State of Washington to consider it in measuring the filing fee and annual license fee of appellant.

From the foregoing decisions it is evident that the necessary effect of the Washington legislation levying taxes or fees on unissued capital stock is to unlawfully discriminate against appellant, deny it the equal protection of the laws, and burden the interstate commerce transacted by it.

Conclusion.

It is respectfully submitted that the case of *Baltic Mining Co. v. Mass.*, 231 U. S. 68, which was relied on by the statutory court in reaching its decision, has been criticized and restricted by this Court in a long array of cases, and was finally by it overruled in the case

of *Alpha Portland Cement Co. v. Mass.*, 268 U. S. 203.

Should this Court find that the Baltic case has not yet been overruled, then it is submitted that this Court should now overrule it in its entirety, for the reasons given in reaching the conclusion therein are in absolute conflict with the principles laid down by this Court in *International Paper Co. v. Mass.*, 246 U. S. 135, wherein this Court restates the principles formulated in scores of preceding cases, beginning with *Western Union Tel. Co. v. Kansas*, 216 U. S. 1.

The undisputed facts set forth in the bill of complaint show that the appellant filed its articles of incorporation and began doing business in Washington thirty-five years before the enactment in the statute complained of, and acquired property of great value, adapted to carrying on both a local and interstate business, the local business being inconsiderable and incidental to, and in aid of, its interstate business, from which it is inseparable without serious impairment to the interstate business. It is also shown that appellant cannot withdraw from the State without great injury and loss to itself.

The facts further show that appellant has issued and outstanding less than two-thirds of its authorized capital stock, and that all of its property in Washington represents less than 1/1000 of its issued capital stock.

It is respectfully submitted that these facts bring the instant case within the principles laid down in the case of *International Paper Co. v. Mass.*, 246 U. S. 135, and, therefore, it is further respectfully submitted that the orders entered herein on May 8th, 1928, and June 7th, 1928, denying an interlocutory injunction

and dismissing the bill of complaint, are erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

Sections 1 and 2, Chapter 149, Laws of the State of Washington, Extraordinary Session 1925:

"Section 1. That Section 3836 of Remington's Compiled Statutes, as amended by Section 1, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory of the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows:

Capital not exceeding $50,000.00, fee $25.00;

Capital of more than $50,000.00, and less than $100,000.00, fee $40.00;

Capital of $100,000.00, or more, and less than $150,000.00, fee $75.00;

Capital of $150,000.00, or more, and less than $200,000.00, fee $100.00;

Capital of $200,000.00, or more, and less than $300,000.00, fee $150.00;

Capital of $300,000.00, or more, and less than $400,000.00, fee $200.00;

Capital of $400,000.00, or more, and less than $500,000.00, fee $250.00;

Capital of $500,000.00, or more, and less than $1,000,000.00, fee $500.00;

Capital of $1,000,000.00, or more, and less than $2,000,000.00, fee $750.00; and $10.00 additional for each $1,000,000.00, or major fraction thereof, of capital stock in excess of $2,000,000.00; *Provided, however,* That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.00.

Section 2. That Section 3837 of Remington's Compiled Statutes, as amended by Section 2, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificates of decrease of capital stock, shall pay to the secretary of state a filing fee of $25.00. For filing of other amendatory or supplemental articles, it shall pay a fee of $10.00; Provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000.00, plus $10.00 for each separate instrument filed in addition to its original articles of incorporation."

Section 3, Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, amended Section 3841 of Remington's Compiled Statutes, to read as follows:

"Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the

first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized capital stock, as follows:

Capital of $50,000.00, or less, fee $15.00;

Capital in excess of $50,000.00, and up to and including $100,000.00, fee $25.00;

Capital in excess of $100,000.00, and up to and including $500,000.00, fee $50.00;

Capital in excess of $500,000.00, and up to and including $1,000,000.00, fee $100.00;

Capital in excess of $1,000,000.00, and up to and including $2,000,000.00, fee $150.00; and $10.00 for each $1,000,000.00, or fraction thereof of capital in excess of $2,000,000.00: *Provided, however,* That the total amount of such annual license fee shall in no case exceed $3,000.00. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents: *Provided, however,* That building and loan and savings and loan associations paying special fees provided for in the act under which same are incorporated shall not be required to pay the regular fee provided herein: *Provided, further,* That the annual fee required to be paid to the department of public works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act."

Section 3842 of Remington's Compiled Statutes of Washington, 1922:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due. A certificate of the payment of such annual license fee, or any duplicate of such certificate under the seal of the secretary of state, shall be prima facie evidence of such payment; and the secretary of state is hereby required to issue such duplicate certificates, upon request, at a charge of twenty-five cents for each thereof. The state board of tax commissioners may institute suits to enforce the payment of any license fee, due from any corporation under this or any other law. Failure upon the part of any corporation to pay its annual license fee for a period of one year, from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation; Provided, that as to corporations now delinquent in the payment of their annual license fees for a period of one or more years, such presumption of insolvency shall not exist until after one year from the date of the passage of this act and the continuation of such delinquency. It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records: Provided, that no corporate name shall be so stricken from the records for a period of one year, from the date of the passage of this act."

Section 3843 of Remington's Compiled Statutes of Washington, 1927:

"Every corporation whose name has been, or shall hereafter be, stricken from the records of the office of the secretary of state in pursuance of law for failure to pay its annual license fee for two years, is hereby authorized and permitted to apply to the secretary of state for reinstatement at any time within three years after its name has been stricken from the records of the office of the secretary of state. Any corporation stricken from the records and dissolved, as provided in this chapter, may at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation, and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up its affairs, such method of procedure is hereby validated and approved."

Section 3844 of Remington's Compiled Statutes of Washington, 1927 Condition—Prepayment of Fees and Penalty:

"Any corporation so applying for reinstatement shall at the time of its application pay to the Secretary of State for the use of the state all license fees and penalties then due from it and the additional sum of ten dollars for each and every year that its name has been stricken from the records, and upon the making of such application and such payment, it shall be the duty of the secretary of state to enter upon his record a notation that such corporation is reinstated."

Section 3846 of Remington's Compiled Statutes of Washington 1922:

"If, however, within the period named within which a corporation may make application to be reinstated such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that such corporation is dissolved, and it shall thereupon be dissolved and the trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

Section 3853 of Remington's Compiled Statutes of Wahington, 1927:

"Such corporation shall cause to be filed and recorded in the office of the secretary of state certified copy of its charter, articles of incorporation, memorandum of association, or certificate of incorporation, and a certified copy of each and all of the amendments or supplements to such charter, articles of incorporation, memorandum of association, or certificate of incorporation, and a certified copy of each and all of its certificates of increase or decrease of its capital stock, each of said instruments to be certified to by the officer who is the custodian of the same according to the laws of the state or territory, country or colony, where such corporation is incorporated, or who is authorized to issue certificates of incorporation according to the laws of such state, territory, or foreign country or colony. The instruments herein required to be filed and recorded shall be attested by such certifying officer under his hand and seal of office, which attestation shall be prima facie proof of the facts therein stated, and of the genuineness of the certificate. If such officer has no official seal, his certificate shall state that fact over his signature, and thereupon the secretary of state, or of the territory, in case of corporations within the United

States, and the consul-general, consul, vice-consul, deputy consul, consular agent, or commercial agent of the United States, at or nearest to the place where such certificate is made, in the case of corporations not within the United States, shall certify under his hand and seal of office to the genuineness of the signature of the officer making the certificate, and to the fact that at the time of making such certificate the person making the same held the office described in the certificate."

Section 3854 of Remington's Compiled Statutes of Washington, 1922:

"Such corporations shall also constitute and appoint an agent, who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is to be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business

within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and recording with the secretary of state a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state and the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

Section 3855 of Remington's Compiled Statutes of Washington, 1922:

"Any foreign corporation doing business in this state which shall fail to comply with the provisions of the two preceding sections, shall be subject to a penalty of two hundred and fifty dollars to be recovered in a civil action to be instituted by the attorney general in the name of the state of Washington, upon his being furnished with a sworn statement of facts sufficient to justify such action."

Section 3861 of Remington's Compiled Statutes of Washington, 1922, provides:

> "Any agent of any foreign corporation, conducting or carrying on business within the limits of this State, for and in the name of such corporation, contrary to any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment."